

WEDNESDAY, MARCH 7, 1979

PART IV



**DEPARTMENT OF
ENERGY**

**COMPLIANCE WITH
FLOODPLAIN/WETLANDS
ENVIRONMENTAL
REVIEW REQUIREMENTS**

[6450-01-M]

Title 10—Energy

CHAPTER X—DEPARTMENT OF ENERGY (GENERAL PROVISIONS)

PART 1022—COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS

AGENCY: Department of Energy.

ACTION: Final rulemaking.

SUMMARY: The Department of Energy (DOE) hereby establishes Part 1022 of Chapter X of title 10 of the Code of Federal Regulations, providing for compliance with Executive Order (E.O.) 11988—Floodplain Management, and E.O. 11990—Protection of Wetlands.

The regulations are applicable to all organizational units of DOE, except the Federal Energy Regulatory Commission (FERC), and are designed to be coordinated with the environmental review requirements established pursuant to the National Environmental Policy Act (NEPA). The final regulations published herein contain certain revisions to the proposed regulations, published in the *FEDERAL REGISTER* on July 19, 1978 (43 FR 31108), based on DOE's consideration of comments received.

EFFECTIVE DATE: March 7, 1979.

FOR FURTHER INFORMATION CONTACT:

Dr. Robert J. Stern, Acting Director, NEPA Affairs Division, Office of the Assistant Secretary for Environment, Room 6229, 20 Massachusetts Avenue, N.W., Washington, D.C. 20545, 202-376-5998.

Mr. Stephen H. Greenleigh, Acting Assistant General Counsel for Environment, Room 8217, 20 Massachusetts Avenue, N.W., Washington, D.C. 20545, 202-376-4266.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Comments Received
- III. DOE Response
- IV. Effective Date

I. BACKGROUND

On July 19, 1978, DOE published in the *FEDERAL REGISTER* (43 FR 31108) a notice of proposed rulemaking to establish 10 CFR Part 1022, DOE regulations for compliance with floodplain/wetlands environmental review requirements. The proposed regulations were drafted in response to Executive Orders 11988 and 11990 regarding floodplain management and wetlands protection, respectively, which were issued on May 24, 1977. The regula-

tions were proposed to be applicable to all organizational units of DOE, except the FERC.

A public hearing was scheduled to be held on August 17, 1978, but only one request to speak was received. The hearing was cancelled by subsequent notice in the *FEDERAL REGISTER*, and the requesting party, the Sierra Club, met informally with DOE representatives to discuss its views on the proposed regulations. The formal comment period closed on August 28, 1978; DOE has, however, considered late comments in the preparation of these final regulations.

II. COMMENTS RECEIVED

Written comments were received from 12 organizations and agencies, including the Department of the Interior (DOI), Army Corps of Engineers, Environmental Protection Agency (EPA), Water Resources Council (WRC), Federal Insurance Administration (FIA), Council on Environmental Quality (CEQ), Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, Georgia State Department of Planning and Budget, State of Vermont Agency of Environmental Conservation, and Marathon Oil Company.

DOE has carefully considered all comments received, and has modified the proposed regulations, as appropriate, to assure that the final regulations represent sound policy and procedures for floodplain management and wetlands protection. DOE's analysis and treatment of the major substantive comments are summarized below.

III. DOE RESPONSE

A. RELATIONSHIP TO DOE NEPA PROCEDURES AND CEQ NEPA REGULATIONS

In accordance with the intent of both Executive orders that Federal agencies implement the floodplain/wetlands requirements through existing procedures, such as those established to implement NEPA, DOE designed its proposed floodplain/wetlands regulations to be implemented in conjunction with its proposed regulations for compliance with NEPA, originally intended to be codified at 10 CFR Part 1021 (*FEDERAL REGISTER*, February 21, 1978). Several commenters questioned the relationship of the floodplain/wetlands regulations to the NEPA regulations, given the fact that the DOE NEPA regulations had not been promulgated.

DOE had intended to finalize 10 CFR Part 1021 prior to the promulgation of floodplain/wetlands regulations. However, due to the recent publication of final CEQ NEPA regulations (*FEDERAL REGISTER*, November 29, 1978), DOE no longer intends to final-

ize the rules which were proposed in February. Instead, DOE is preparing implementing procedures as required by the CEQ NEPA regulations. The basic approach of coordinating the floodplain/wetlands review procedures with existing (and future) DOE NEPA procedures remains intact. However, specific references to 10 CFR Part 1021 have been deleted. In addition, DOE has modified certain floodplain/wetlands requirements and definitions of NEPA documentation used herein to be consistent with the CEQ NEPA regulations and the anticipated DOE NEPA procedures.

A related comment pertained to the administrative framework for assuring DOE compliance with its floodplain/wetlands responsibilities. DOE intends to utilize the internal framework established with respect to NEPA compliance to fulfill its floodplain/wetlands responsibilities. Such internal authorities and responsibilities are embodied in internal DOE Orders and memoranda and are not included in these regulations, in order to maintain necessary flexibility. To address this concern, however, a new provision (§ 1022.18) has been added to identify the Assistant Secretary for Environment as the central point of contact for inquiries concerning DOE's floodplain/wetlands activities.

B. DETAILED STANDARDS AND PROCEDURES

In combined comments, WRC, CEQ, and FIA suggested that the final regulations establish "specific standards" for key substantive and procedural requirements of the floodplains Order. For example, it was suggested that specific standards be provided with respect to what constitutes a "practicable alternative" to siting in a floodplain. DOI also commented that the "spirit and intent" of the two Orders requires "considerably more details" in agency procedures "to provide a higher level of consideration to the natural and beneficial values of floodplains and wetlands."

While DOE is sympathetic to the goals expressed in these comments, it believes that the evaluation of floodplain/wetlands impacts is inherently site-specific in nature, and that the determination of what constitutes a "practicable alternative" can only be made after balancing relevant factors on a case-by-case basis. DOE believes that these regulations adequately provide the framework within which this process can take place, and that these regulations, as revised, fully satisfy the requirements of both Executive orders. Additional detailed guidance will be provided, as appropriate, through internal DOE Orders, guidelines and memoranda.

C. DEFINITIONS

Several comments were received regarding DOE's definitions of terms (§ 1022.4), which differed somewhat from the definitions set forth in WRC's Floodplain Management Guidelines (40 FR 6030, February 10, 1978). Two commenters objected to the definition of "action" as "any DOE activity," and suggested that DOE adopt WRC's definition, which specifies the kinds of activities covered by the term "action." DOE had included such language in the applicability section (§ 1022.5(d)) of the proposed regulations. Moreover, it was felt that the DOE definition of action assured broad application of the floodplain/wetlands review requirements. Nevertheless, to alleviate this concern, DOE has restructured the regulations so as to include the WRC language in the definition of "action."

Several commenters objected to DOE's definition of "minimize" as "to reduce to the smallest degree practicable," again suggesting that DOE use the WRC definition, i.e., "to reduce to the smallest degree." DOE believes that its definition is justified, and notes that the WRC Guidelines explain that:

while minimize means to reduce to the smallest amount or degree, there is an implicit acceptance of practical limitations. Agencies are required to use all practicable (WRC's emphasis) means and measures to minimize harm. The Order does not expect agencies to employ unworkable means to meet this goal.

In light of the WRC qualification and to avoid possible confusion concerning the intended meaning of "minimize," DOE believes it is appropriate to reaffirm the practicable nature of the term "minimize" in its definition.

Another commenter objected to DOE's addition of implementation time to WRC's definition of "practicable." The WRC Guidelines listed cost, environment and technology as pertinent factors in judging practicability. In DOE's view, implementation time is an appropriate consideration in determining practicability since it may bear directly on the achievement of program objectives. Accordingly, implementation time has been retained in the definition of "practicable."

WRC expressed particular concern over the variance in DOE's definition of "floodplain." In response to this and similar comments, DOE has modified its definitions of "floodplain," "structure," and "flood or flooding" to conform with WRC's definitions.

In order to be consistent with the terminology established in the CEQ NEPA regulations, DOE has eliminated the term "Negative Determination" (a public notice that no environmental impact statement (EIS) will be prepared) from these regulations and sub-

stituted the term "Finding of No Significant Impact" (FONSI), which is used in 40 CFR Part 1500. Until the effective date of the CEQ regulations, a Negative Determination prepared pursuant to currently applicable DOE NEPA regulations will be considered synonymous with the FONSI used herein. Similarly, the definition of an environmental assessment (EA) for purposes of these regulations, has been modified to conform with the CEQ definition.

D. APPLICABILITY

Several commenters questioned the exclusion of FERC from the applicability of these regulations (§ 1022.4(a)). In this regard, it should be noted that FERC is an independent regulatory commission within DOE and is not "subject to the supervision or direction of any officer, employee, or agent of any other part of the Department" (DOE Organization Act, 42 USC 7171). FERC has indicated its intention to incorporate floodplain/wetlands considerations into its NEPA compliance process, which is also administered independently from that of DOE.

Other commenters questioned DOE's application of the regulations to floodplain/wetlands actions "where practicable modifications of/or alternatives to the proposed action are still available" (§ 1022.5(b)). The reviewers could not envision a situation in which alternatives had been foreclosed and in which it was no longer possible to modify an activity. DOE agrees that there may be circumstances in which it is still practicable to modify a proposed activity even after implementation has begun. DOE has therefore made a change in § 1022.5(b) to specify that where the review of alternatives is no longer practicable or where DOE determines to take action in a floodplain, DOE shall design or modify the selected alternative to reduce adverse effects and mitigate flood hazard. This should also eliminate the confusion some reviewers experienced concerning the meanings of "modifications" and "alternatives."

Three commenters objected to the exemptions provided in § 1022.5(e) for floodproofing and flood protection of existing DOE structures or facilities, and maintenance activities. The commenters felt that such activities may indeed have long- and short-term adverse impacts on floodplains and wetlands. In response to these comments, DOE has eliminated the exemption of floodproofing and flood protection activities, and has modified the exemption of maintenance activities to include only routine maintenance (§ 1022.5(g)). DOE has retained language which enables consideration of the need for a floodplain/wetlands as-

essment for routine maintenance involving unusual circumstances.

E. PUBLIC NOTIFICATION PROCEDURES

Several commenters felt that reliance on the publication of a notice in the FEDERAL REGISTER (§ 1022.14) with respect to a proposed floodplain/wetlands action does not satisfy the requirements for early public review and does not encourage public participation in the floodplain/wetlands decisionmaking process. It is DOE's intent to incorporate floodplain/wetlands notification requirements into the current (and future) applicable NEPA procedures and documentation. DOE believes that these public notification requirements, including the enhanced notification and scoping requirements specified in the CEQ NEPA regulations, will assure an adequate public notification process for those DOE actions, requiring an EIS. Pending the effective date of the CEQ NEPA regulations and DOE implementing procedures, DOE shall, to the extent practicable, issue a Notice of Intent (NOI) to prepare an EIS for proposed floodplain/wetlands actions, where appropriate, and shall circulate the NOI to persons and agencies known to be interested in or affected by the proposed action. New language has been added to § 1022.14 to assure that similar policies and procedures apply to floodplain/wetlands actions, for which no EIS is prepared.

DOE has retained the proposed comment periods following publication of the early public notice and the statement of findings rather than expand these periods as suggested by several commenters. It is believed that the periods allotted in the proposed regulations will permit adequate public participation without unduly delaying agency decisionmaking.

F. OMISSIONS

Four commenters cited omissions in the proposed regulations concerning certain specific requirements of the Executive orders, including policies and procedures with respect to:

1. Consideration of flood hazards for actions involving licenses, permits, loans, grants, or other forms of financial assistance;
2. Delineation of past and probable flood height on DOE property;
3. Lease, easement, right-of-way, or disposal of property to non-Federal entities;
4. Leadership to reduce the risk of flood loss and to minimize the impact of floods on human safety, health and welfare; and
5. Periodic review and update of these regulations.

DOE notes that these items were inadvertently omitted and has, therefore, included provisions in § 1022.3 to

address items 1, 2, and 4 above; § 1022.5 to assess items 1 and 3; and § 1022.21 to address item 5.

G. MISCELLANEOUS

Four commenters cited the proposed regulations failure to identify compliance with National Flood Insurance Program (NFIP) standards as a *minimum* requirement, as stated in E.O. 11988. In response, § 1022.3(b) has been modified.

Two commenters were concerned with the procedures for making a wetlands determination in areas where the U.S. Fish and Wildlife Service National Wetlands Inventory maps are not yet available. Several possible alternate sources of information were recommended; these have been added to § 1022.11(c).

The WRC objected to the use of the final EIS as the vehicle to transmit the statement of findings because the final EIS is a pre-decisional document. WRC believes that E.O. 11988 requires the statement of findings to be issued *after* a decision is made. However, section 2(a)(2) of E.O. 11988 requires only that the statement of findings be prepared and circulated for brief public review *prior* to taking action. The final EIS is also issued for review prior to taking action. DOE believes it is useful to incorporate the statement of findings in a final EIS, where possible. Moreover, EPA in its comments, suggested it would be beneficial to issue a draft statement of findings in a draft EIS. Since E.O. 11988 provides for a period of public comment on the statement of findings, DOE feels that this document is most meaningful if it precedes the Agency's final decision.

Several commenters suggested that DOE delete the proposed requirement to review mitigation measures in the floodplain/wetlands assessment because of the Executive orders prohibition against actions in the floodplain/wetlands unless no practicable alternative is available. While DOE is aware of that requirement, it believes that the decisionmaking process as well as public participation in the decision-making process will be best served by a review of all relevant considerations in one document. Thus, DOE has continued the requirement that mitigation measures be reviewed along with practicable alternatives in the floodplain/wetlands assessment.

IV. EFFECTIVE DATE

Executive Order 11988 required agencies to issue or amend existing regulations and procedures within one year of its issuance to comply with the Order. DOE has exceeded the time allotted for promulgation of regulations and consequently believes that the goals of the Order will be best served by waiving the normal 30-day transi-

tion period prior to effectiveness of the regulations. Accordingly, these regulations will become effective March 7, 1979.

NOTE.—DOE has determined that because this document does not constitute a significant regulation within the meaning of E.O. 12044, preparation of a regulatory analysis is not required.

In consideration of the foregoing, Chapter X of Title 10 of the Code of Federal Regulations is amended as set forth below, effective upon publication.

Issued in Washington, D.C. February 28, 1979.

RUTH C. CLUSEN,
Assistant Secretary
for Environment.

Part 1022 is added to Title 10, Chapter X, of the Code of Federal Regulations to read as follows:

PART 1022—COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS

Subpart A—General

- Sec.
1022.1 Background.
1022.2 Purpose and scope.
1022.3 Policy.
1022.4 Definitions.
1022.5 Applicability.

Subpart B—Procedures for Floodplain/ Wetlands Review

- 1022.11 Floodplain/wetlands determination.
1022.12 Floodplain/wetlands assessment.
1022.13 Applicant responsibilities.
1022.14 Public review.
1022.15 Notification of decision.
1022.16 Requests for authorizations and appropriations.
1022.17 Follow-up.
1022.18 Timing of floodplain/wetlands actions.
1022.19 Selection of lead agency and consultation among participating agencies.
1022.20 Public inquiries.
1022.21 Updating regulations.
AUTHORITY: E.O. 11988 (May 24, 1977); and E.O. 11990 (May 24, 1977).

Subpart A—General

§ 1022.1 Background.

Executive Order (E.O.) 11988—Floodplain Management (May 24, 1977), requires each Federal agency to issue or amend existing regulations and procedures to ensure that the potential effects of any action it may take in a floodplain are evaluated and that its planning programs and budget requests reflect consideration of flood hazards and floodplain management. Guidance for implementation of the Order is provided in the Floodplain Management Guidelines of the U.S. Water Resources Council (40 FR 6030,

February 10, 1978). Executive Order 11990—Protection of Wetlands (May 24, 1977), requires all Federal agencies to issue or amend existing procedures to ensure consideration of wetlands protection in decisionmaking. It is the intent of both Executive orders that Federal agencies implement the floodplain/wetlands requirements through existing procedures such as those established to implement the National Environmental Policy Act (NEPA) of 1969. In those instances where the impacts of actions in floodplains and/or wetlands are not significant enough to require the preparation of an environmental impact statement (EIS) under section 102(2)(C) of NEPA, alternative floodplain/wetlands evaluation procedures are to be established.

§ 1022.2 Purpose and scope.

(a) This part establishes policy and procedures for discharging the Department of Energy's (DOE's) responsibilities with respect to compliance with E.O. 11988 and E.O. 11990, including:

(1) DOE policy regarding the consideration of floodplain/wetlands factors in DOE planning and decisionmaking; and

(2) DOE procedures for identifying proposed actions located in floodplain/wetlands, providing opportunity for early public review of such proposed actions, preparing floodplain/wetlands assessments, and issuing statements of findings for actions in a floodplain.

(b) To the extent possible, DOE will accommodate the requirements of E.O. 11988 and E.O. 11990 through applicable DOE NEPA procedures.

§ 1022.3 Policy.

DOE shall exercise leadership and take action to:

(a) Avoid to the extent possible the long- and short-term adverse impacts associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of floodplain and wetlands development wherever there is a practicable alternative.

(b) Incorporate floodplain management goals and wetlands protection considerations into its planning, regulatory, and decisionmaking processes, and shall to the extent practicable:

(1) Reduce the hazard and risk of flood loss;

(2) Minimize the impact of floods on human safety, health, and welfare;

(3) Restore and preserve natural and beneficial values served by floodplains;

(4) Require the construction of DOE structures and facilities to be, at a minimum, in accordance with the standards and criteria set forth in, and consistent with the intent of, the regulations promulgated by the Federal In-

insurance Administration pursuant to the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4001 *et seq.*

(5) Minimize the destruction, loss, or degradation of wetlands;

(6) Preserve and enhance the natural and beneficial values of wetlands;

(7) Promote public awareness of flood hazards by providing conspicuous delineations of past and probable flood heights on DOE property which has suffered flood damage or is in an identified flood hazard area and which is used by the general public; and

(8) Prior to the completion of any financial transaction related to an area located in a floodplain, which is guaranteed, approved, regulated or insured by DOE, inform any private participating parties of the flood-related hazards involved.

(c) Undertake a careful evaluation of the potential effects of any DOE action taken in a floodplain and any new construction undertaken by DOE in wetlands not located in a floodplain.

(d) Identify, evaluate, and, as appropriate implement alternative actions which may avoid or mitigate adverse floodplain/wetlands impacts; and

(e) Provide opportunity for early public review of any plans or proposals for actions in floodplains and new construction in wetlands.

§ 1022.4 Definitions.

For purposes of this part:

(a) "Action" means any DOE activity, including, but not limited to:

(1) Acquiring, managing, and disposing of Federal lands and facilities;

(2) DOE-undertaken, financed, or assisted construction and improvements; and

(3) The conduct of DOE activities and programs affecting land use, including but not limited to water and related land resources planning, regulating and licensing activities.

(b) "Base Flood" means that flood which has a 1 percent chance of occurrence in any given year (also known as a 100-year flood).

(c) "Critical Action" means any activity for which even a slight chance of flooding would be too great. Such actions may include the storage of highly volatile, toxic, or water reactive materials.

(d) "Environmental Assessment" (EA) means a document for which DOE is responsible that serves to: (1) briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a finding of no significant impact, (2) aid DOE compliance with NEPA when no EIS is necessary, and (3) facilitate preparation of an EIS when one is necessary. The EA shall include brief discussions of the need for the proposal, alternatives, en-

vironmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

(e) "Environmental Impact Statement" means a document prepared in accordance with the requirements of section 102(2)(C) of NEPA.

(f) "Facility" means any man-placed item other than a structure.

(g) "Finding of No Significant Impact" (FONSI) means a document prepared by DOE which briefly presents the reasons why an action will not significantly effect on the human environment and for which an EIS therefore will not be prepared.

(h) "Flood or Flooding" means a temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the unusual and rapid accumulation or runoff of surface waters from any source.

(i) "Floodplain" means the lowlands adjoining inland and coastal waters and relatively flat areas and flood-prone areas of offshore islands including, at a minimum, that area inundated by a 1 percent or greater chance flood in any given year. The base floodplain is defined as the 100-year (1.0 percent) floodplain. The critical action floodplain is defined as the 500-year (0.2 percent) floodplain.

(j) "Floodplain Action" means any DOE action which takes place in a floodplain.

(k) "Floodplain/Wetlands Assessment" means an evaluation consisting of a description of a proposed action, a discussion of its effects on the floodplain/wetlands, and consideration of alternatives.

(l) "Floodproofing" means the modification of individual structures and facilities, their sites, and their contents to protect against structural failure, to keep water out, or to reduce the effects of water entry.

(m) "High Hazard Areas" means those portions of riverine and coastal floodplains nearest the source of flooding which are frequently flooded and where the likelihood of flood losses and adverse impacts on the natural and beneficial values served by floodplains is greatest.

(n) "Minimize" means to reduce to the smallest degree practicable.

(o) "New Construction" for the purpose of compliance with E.O. 11990 includes draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after October 1, 1977.

(p) "Practicable" means capable of being accomplished within existing constraints. The test of what is practicable depends on the situation and includes consideration of many factors, such as environment, cost, technology, and implementation time.

(q) "Public Notice" means a brief notice published in the FEDERAL REGISTER, and circulated to affected and interested persons and agencies, which describes a proposed floodplain/wetlands action and affords the opportunity for public review.

(r) "Preserve" means to prevent modification to the natural floodplain/wetlands environment or to maintain it as closely as possible to its natural state.

(s) "Restore" means to reestablish a setting or environment in which the natural functions of the floodplain can again operate.

(t) "Statement of Findings" means a statement issued pursuant to E.O. 11988 which explains why a DOE action is proposed in a floodplain, lists alternatives considered, indicates whether the action conforms to State and local floodplain standards, and describes steps to be taken to minimize harm to or within the floodplain.

(u) "Structure" means a walled or roofed building, including mobile homes and gas or liquid storage tanks.

(v) "Wetlands" means those areas that are inundated by surface or groundwater with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, pot-holes, wet meadows, river overflow, mudflats, and natural ponds.

(w) "Wetlands Action" means an action undertaken by DOE in a wetlands not located in a floodplain, subject to the exclusions specified at § 1022.5(c).

§ 1022.5 Applicability.

(a) This part shall apply to all organizational units of DOE, except that it shall not apply to the Federal Energy Regulatory Commission.

(b) This part shall apply to all proposed floodplain/wetlands actions, including those sponsored jointly with other agencies, where practicable alternatives to the proposed action are still available. With respect to programs and projects for which the appropriate environmental review has been completed or a final EIS filed prior to the effective date of these regulations, DOE shall, in lieu of the procedures set forth in this part, review the alternatives identified in the environmental review or in the final EIS to determine whether an alternative action may avoid or minimize impacts on the floodplain/wetlands. If project or program implementation has progressed to the point where review of alternatives is no longer practicable, or if DOE determines after a review of al-

ternatives to take action in a floodplain, DOE shall design or modify the selected alternative in order to minimize potential harm to or within the floodplain and to restore and preserve floodplain values. DOE shall publish in the FEDERAL REGISTER, a brief description of measures to be employed and shall endeavor to notify appropriate Federal, State, and local agencies and persons or groups known to be interested in the action.

(c) This part shall not apply to wetlands projects under construction prior to October 1, 1977; wetlands projects for which all of the funds have been appropriated through fiscal year 1977; or wetlands projects and programs for which a draft or final EIS was filed prior to October 1, 1977. With respect to proposed actions located in wetlands (not located in a floodplain), this part shall not apply to the issuance by DOE of permits, licenses, or allocations to private parties for activities involving wetlands which are located on non-Federal property.

(d) This part applies to activities in furtherance of DOE responsibilities for acquiring, managing, and disposing of Federal lands and facilities. When property in a floodplain or wetlands is proposed for lease, easement, right-of-way, or disposal to non-Federal public or private parties, DOE shall: (1) identify those uses that are restricted under Federal, State, or local floodplains or wetlands regulations; (2) attach other appropriate restrictions to the uses of the property; or (3) withhold the property from conveyance.

(e) This part applies to activities in furtherance of DOE responsibilities for providing federally undertaken, financed, or assisted construction and improvements. Applicants for assistance shall provide DOE with an analysis of the impacts which would result from any proposed wetland or floodplain activity.

(f) This part applies to activities in furtherance of DOE responsibilities for conducting Federal activities and programs affecting land use, including but not limited to, water and related resource planning, regulating and licensing activity.

(g) This part ordinarily shall not apply to routine maintenance of existing facilities and structures on DOE property within a floodplain/wetlands since such actions normally have minimal or no adverse impact on a floodplain/wetlands. However, where unusual circumstances indicate the possibility of impact on a floodplain/wetlands, DOE shall consider the need for a floodplain/wetlands assessment for such actions.

(h) The policies and procedures of this part which are applicable to floodplain actions shall apply to all pro-

posed actions which occur in a wetlands located in a floodplain.

Subpart B—Procedures for Floodplain/Wetlands Review

§ 1022.11 Floodplain/wetlands determination.

(a) Concurrent with its review of a proposed action to determine appropriate NEPA requirements, DOE shall determine the applicability of the floodplain management and wetlands protection requirements of this part.

(b) In making the floodplain determination, DOE shall utilize the Flood Insurance Rate Maps (FIRM's) or the Flood Hazard Boundary Maps (FHBM's) prepared by the Federal Insurance Administration of the Department of Housing and Urban Development to determine if a proposed action is located in the base or critical action floodplain, as appropriate. For a proposed action in an area of predominantly Federal or State land holdings where FIRM or FHBM maps are not available, information shall be sought from the land administering agency (e.g., Bureau of Land Management, Soil Conservation Service, etc.) or from agencies with floodplain analysis expertise.

(c) In making the wetlands determination, DOE shall utilize information available from the following sources, as appropriate: (1) U.S. Fish and Wildlife Service National Wetlands Inventory; (2) U.S. Department of Agriculture Soil Conservation Service Local Identification Maps; (3) U.S. Geological Survey Topographic Maps; (4) State wetlands inventories; and (5) regional or local government-sponsored wetland or land use inventories.

§ 1022.12 Floodplain/wetlands assessment.

(a) If DOE determines, pursuant to §§ 1022.5 and 1022.11, that this part is applicable to the proposed action, DOE shall prepare a floodplain/wetlands assessment, which shall contain the following information:

(1) *Project Description.* This section shall describe the nature and purpose of the proposed action, and shall include a map showing its location with respect to the floodplain and/or wetlands. For actions located in a floodplain, the high hazard areas shall be delineated and the nature and extent of the potential hazard shall be discussed.

(2) *Floodplain/Wetlands Effects.* This section shall discuss the positive and negative, direct and indirect, and long- and short-term effects of the proposed action on the floodplain and/or wetlands. The effects of a proposed floodplain action on lives and property, and on natural and beneficial floodplain values shall be evaluated. For actions taken in wetlands, the

effects on the survival, quality, and natural and beneficial values of the wetlands shall be evaluated.

(3) *Alternatives.* Alternatives to the proposed action which may avoid adverse effects and incompatible development in the floodplain/wetlands shall be considered, including alternate sites, actions, and no action. Measures that mitigate the adverse effects of actions in a floodplain or wetlands, including but not limited to minimum grading requirements, runoff controls, design and construction constraints, and protection of ecology-sensitive areas shall be addressed.

(b) For proposed floodplain or wetlands actions for which an EA or EIS is required, the floodplain/wetlands assessment shall be prepared concurrent with and included in the appropriate NEPA document.

(c) For floodplain/wetlands actions for which neither an EA or EIS is prepared, a separate document shall be issued as the floodplain/wetlands assessment.

§ 1022.13 Applicant responsibilities.

DOE may require applicants for a DOE permit, license, certificate, financial assistance, contract award, allocation or other entitlement to submit a report on a proposed floodplain/wetlands action. The report shall contain the information specified at § 1022.12 and shall be prepared in accordance with the guidance contained in this part.

§ 1022.14 Public review.

(a) For proposed floodplain/wetlands actions for which an EIS is required, the opportunity for early public review will be provided through applicable NEPA procedures. A Notice of Intent to prepare an EIS may be used to satisfy this requirement.

(b) For proposed floodplain/wetlands actions for which no EIS is required, DOE shall provide the opportunity for early public review through publication of a Public Notice, which shall be published in the FEDERAL REGISTER, as soon as practicable after a determination that a floodplain/wetlands may be affected and at least 15 days prior to the issuance of a statement of findings with respect to a proposed floodplain action. DOE shall take appropriate steps to inform Federal, State, and local agencies and persons or groups known to be interested in or affected by the proposed floodplain/wetlands action. The Public Notice shall include a description of the proposed action and its location and may be incorporated with other notices issued with respect to the proposed action.

(c) Following publication of the Public Notice, DOE shall allow 15 days

for public comment prior to making its decision on the proposed action, except as specified in § 1022.18(c). At the close of the public comment period, DOE shall reevaluate the practicability of alternatives to the proposed floodplain/wetlands action and the mitigating measures, taking into account all substantive comments received.

§ 1022.15 Notification of decision.

(a) If DOE finds that no practicable alternative to locating in the floodplain/wetlands is available, consistent with the policy set forth in E.O. 11988, DOE shall, prior to taking action, design or modify its action in order to minimize potential harm to or within the floodplain/wetlands.

(b) For actions which will be located in a floodplain, DOE shall publish a brief (not to exceed three pages) statement of findings which shall contain:

- (1) A brief description of the proposed action, including a location map;
- (2) An explanation indicating why the action is proposed to be located in the floodplain;
- (3) A list of alternatives considered;
- (4) A statement indicating whether the action conforms to applicable State or local floodplain protection standards; and
- (5) A brief description of steps to be taken to minimize potential harm to or within the floodplain.

For floodplain actions which require preparation of an EA or EIS, the statement of findings may be incorporated into the FONSI or final EIS, as appropriate, or issued separately. Where no EA or EIS is required, DOE shall publish the statement of findings in the FEDERAL REGISTER and distribute copies to Federal, State, and local agencies and others who submitted comments as a result of the Public Notice. For floodplain actions subject to the Office of Management and Budget (OMB) Circular A-95, DOE shall send the statement of findings to the State and areawide A-95 Clearinghouses for the geographic area affected.

§ 1022.16 Requests for authorizations or appropriations.

DOE shall indicate in any requests for new authorizations or appropriations transmitted to OMB, if a proposed action will be located in a flood-

plain or wetlands, whether the proposed action is in accord with the requirements of E.O. 11990 E.O. 11988, and these regulations.

§ 1022.17 Follow-up.

For those DOE actions taken in floodplain/wetlands, DOE shall verify that the implementation of the selected alternative, particularly with regard to any adopted mitigating measures, is proceeding as described in the floodplain/wetlands assessment and statement of findings.

§ 1022.18 Timing of floodplain/wetlands actions.

(a) Prior to implementing a proposed floodplain action, DOE shall endeavor to allow at least 15 days of public review after publication of the statement of findings.

(b) With respect to wetlands actions (not located in a floodplain), DOE shall take no action prior to 15 days after publication of the Public Notice in the FEDERAL REGISTER.

(c) Where emergency circumstances, statutory deadlines, of overriding considerations of program or project expense or effectiveness exist, the minimum time periods may be waived.

§ 1022.19 Selection of a lead agency and consultation among participating agencies.

When DOE and one or more other Federal agencies are directly involved in a floodplain/wetlands action, DOE shall consult with such other agencies to determine if a floodplain/wetlands assessment is required, to identify the appropriate lead or joint agency responsibilities, to identify the applicable regulations, and to establish procedures for interagency coordination during the environmental review process.

§ 1022.20 Public inquiries.

Inquiries regarding DOE's floodplain/wetlands activities may be directed to the Assistant Secretary for Environment, Department of Energy, Washington, D.C. 20545.

§ 1022.21 Updating regulations.

DOE shall periodically review these regulations, evaluate their effectiveness, and make appropriate revisions.

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